

BEFORE THE

Federal Communications Commission

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WASHINGTON, D.C. 20554

OCT 12 1993

In the Matter of:

Amendment of Section 76.51 of the)
 Commission's Rules to Include)
 Concord, California in the)
 San Francisco-Oakland-San Jose,)
 California, Television Market)

MM DOCKET 93-232

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Chief, Mass Media Bureau

REPLY TO COMMENTS OF VIACOM INTERNATIONAL, INC.

First Century Broadcasting, Inc., licensee of KFCB-TV, Channel 42, Concord, California (KFCB) files this reply in response to the "Comments of Viacom International, Inc." (Viacom). Viacom opposes inclusion of Concord, California as a designated community in the San Francisco-Oakland-San Jose television market.¹

Inclusion of Concord would place KFCB on a far more equal footing with other San Francisco ADI stations.² As it is now, KFCB is considered a distant signal and is therefore subject to copyright liability on more systems than any other broadcast station licensed to one of the designated communities in the San Francisco ADI. Copyright liability serves as a deterrent for carriage on distant cable systems within a station's ADI.

¹ KFCB filed a consent motion for extension of time to file reply comments in this proceeding on October 5, 1993. KFCB requested a two-business day extension until October 12, 1993 to file reply comments. The Commission advised telephonically that the consent motion had been granted.

² Reference to the San Francisco ADI refers to the San Francisco-Oakland-San Jose, California ADI.

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Although generally all cable systems within an ADI must carry stations within the ADI, stations which are considered distant signals must reimburse cable systems for any increased copyright liability. Small independent stations like KFCB with limited resources simply cannot afford to reimburse all these systems for copyright liability. This copyright liability deterrent, at least with respect to KFCB, serves Viacom's purposes as well. It is no secret that Viacom has taken every opportunity to avoid carriage of KFCB, and for that matter other local broadcast outlets, since enactment of the Cable Act. In May 1993, Viacom filed suit challenging the constitutionality of Sections 4 and 5 of the Cable Act and requesting a temporary restraining order enjoining implementation of Sections 4 and 5 of the Act. Viacom sought inter alia relief from having to carry KFCB on its East Bay area and San Francisco cable systems. The United States District Court for Northern District of California, although granting a temporary restraining order, denied Viacom's request for a preliminary injunction and lifted the temporary restraining order.

Viacom is, in essence, battling once again the Cable Act within the context of KFCB's efforts to even the playing field by including Concord within the San Francisco ADI. The crux of Viacom's argument is that KFCB is merely a "second screen" for United Christian Broadcasting Network -- a network consisting of only two stations, KFCB and KLXV, Channel 65 in San Jose, California. Viacom alleges that the programming of both stations is essentially the same and that since KLXV is already

licensed to San Jose, which is included within San Francisco designated market, the relief requested by KFCB should be denied.

There are a number of problems with Viacom's argument:

- (1) Viacom has inaccurately described the relation between KFCB and KLXV.
- (2) The Cable Act and Commission Rules already provide protection against carriage of television stations which substantially duplicate programming.
- (3) KFCB is unaware of any market redesignation action, and Viacom cites none, where the content of programming of a local independent station has been considered in market redesignation.

Viacom's public interest "second screen" substantial duplication argument has already been considered and fully addressed by Congress and the Commission. 47 U.S.C. 534(b)5 and Rule §76.56(b)5 have in essence already defined a "second screen." The Cable Act carefully defines substantial duplication in order to ensure the public is provided as much local programming as reasonably possible. Viacom is attempting to substitute its definition of substantial duplication for that of the Cable Act. If KFCB and KLXV substantially duplicate each other's programming, there is no requirement to carry both. Inclusion of Concord in the San Francisco ADI will in no way expand the statutory definition of what has already been determined to be programming which is substantially duplicative.

KFCB notes Viacom has in several material respects misstated the facts in presenting its "second screen" argument. For example, Viacom states "under Section 5.2 [of the Affiliation Agreement], neither KFCB-TV nor KLXV-TV may interrupt or preempt UCB's prime time network programming." Comments at p. 4.

However, ¶5.2 of the Affiliation Agreement specifically references ¶1.3 which provides that KFCB may preempt network programming for programming KFCB deems of greater local or national importance, or for programming responsive to community needs. Viacom also neglects to reference §5.4 of the Affiliation Agreement which among other things provides that KFCB will determine and review all programming policies, make ultimate decisions concerning all station policies, including finances and operations for hiring and firing station employees and for approval of quarterly budgets and other financial programming issues. Viacom also references a July 12, 1993 letter to Viacom from KLXV-TV which it claims states that 73.97% of KLXV's programming qualifies as substantially duplicative of KFCB's programming under the FCC's must-carry rules. The letter, however, also states that only 37.6% of the weekly broadcast week is substantially duplicated. Noteworthy is the fact that Viacom never claims that KFCB and KLXV's programming are substantially duplicative under the FCC's must-carry rules.³

Viacom's real motive is gleaned from note 5 of its Comments where it asserts the carriage of KFCB-TV might possibly result in the deletion of "popular cable programming services." The Cable Act did not opt for carriage of "popular programming" but of local programming. KFCB is just such a local station. The public interest is served by facilitating carriage of local

³ Viacom engages in a fair degree of speculation such as its unsupported assertion that it appears that KFCB and KLXV may have time shifted their programming to avoid substantial duplication.

stations like KFCB. The Commission adopted the hyphenated market provisions "to help equalize competition between stations in hyphenated markets" and "to assure that stations will have access to cable subscribers in the market and that cable subscribers will have access to all stations in the market." Cable Television Report and Order, 36 FCC Rcd. 143, 176 (1972). The public interest is served by full implementation of the Cable Act and carriage of all must carry stations. This goal is disserved as is the public, when one station in an ADI is effectively denied full must carriage on cable systems solely due to copyright liability resulting from market designation. The relief requested by KFCB will remove the shackles of copyright liability that effectively limit local service by KFCB to the San Francisco ADI. The relief requested by KFCB does not expand the San Francisco ADI, it merely allows KFCB to play on an even playing field with other stations in the market.

Respectfully submitted,

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October 12, 1993

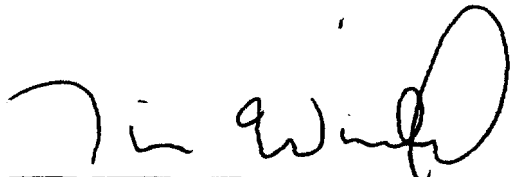
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CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent, this 12th day of October 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing REPLY TO COMMENTS OF VIACOM INTERNATIONAL, INC. to the following:

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